Filed 7/31/19 P. v. Huggins CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARRELL TYRONE HUGGINS, Defendant and Appellant.	B289362 (Los Angeles County Super. Ct. No. PA089399)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Terrell, Judge. Affirmed in part, reversed in part, and remanded.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Darrell Tyrone Huggins (defendant) appeals following his convictions of assault with intent to commit rape and dissuading a witness by force or threat. He contends that the assault conviction (count 1) was not supported by substantial evidence, and that the trial court erred by finding his Florida and Georgia robbery convictions qualified as serious felonies under California law. Defendant also contends that the trial court abused its discretion in denying his *Romero* motion,[1] that the trial court should have stayed the sentence on count 2, pursuant to Penal Code section 654,[2] and that the trial court erred in imposing a $10 crime prevention fee. In addition, defendant seeks correction of errors in the abstract of judgment and to vacate fines and fees imposed without a prior determination of his ability to pay. We vacate the sentence and remand for hearing and resentencing, but finding no merit to defendant's substantial evidence challenge to count 1, we affirm the judgment of conviction.

BACKGROUND

Defendant was charged by information with assault with intent to commit a felony,[3] in violation of section 220, subdivision (a)(1), and with dissuading a witness by force or threat in

---

1 See *People v. Superior Court (Romero)* 13 Cal.4th 497.

2 All further statutory references are to the Penal Code, unless otherwise indicated.

3 The trial court's instructions on the required intent for count 1 were limited to an intent to commit *rape*, and the prosecutor argued only that defendant's intent was to commit rape.

violation of section 136.1, subdivision (c)(1). The information also alleged that defendant had suffered two prior serious or violent felony convictions within the meaning of sections 667, subdivisions (b)-(i), 1170.12, subdivisions (a)-(d) (the "Three Strikes" law), and two prior serious felony convictions within the meaning of section 667, subdivision (a)(1).

A jury found defendant guilty of assault to commit rape (count 1), and dissuading a witness (count 2). Defendant waived his right to a trial on the prior conviction allegations, and admitted the convictions, but not that they qualified as strikes. The trial court found that the convictions were strikes and serious felonies. On April 10, 2018, the trial court sentenced defendant to a total prison term of 30 years to life as to count 1, consisting of 25 years to life pursuant to the Three Strikes law plus five years for the serious felony conviction enhancement under section 667, subdivision (a)(1). The court imposed the same sentence as to count 2, but ordered it to run concurrently with count 1. In addition, the court imposed mandatory fines and fees.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On August 15, 2017, Arnesha M. was working the graveyard shift as a security guard in a residential facility of the Veteran's Administration. Her shift began at 10:00 p.m. and her duties included staffing a security desk on the main floor watching video monitors, as well as making regular rounds to check the building. During her shift, defendant, a resident of the building, approached the security desk and asked Arnesha whether she was going to lunch. When she replied that she had

brought her lunch, defendant said he wanted some. Arnesha replied that she did not share her lunch, and defendant left. At about 2:54 a.m., defendant returned to the desk and told Arnesha that there was noise on the floor above him. She then made her rounds and checked the floor above defendant's room, but heard no noise. She returned to the desk and wrote in the log that there was no noise. Defendant again returned and said he heard noise, so again she checked, and heard nothing. Arnesha determined that defendant was the only resident awake and up in the building.

Defendant then asked Arnesha to come to his room to listen for the noise. She went, but stayed in the hallway outside defendant's open door. From that position she could see pornography on the television, and heard only noise from defendant's loud radio. She declined defendant's request to come into his room so she could hear the noise. Instead, she went back upstairs to check a third time. She found no one awake, and returned to her desk.

Defendant next came and asked her to open up the recreation room in the basement which had been locked at midnight. Since she was not told that she should not let residents in, she unlocked the room for him. Defendant told her it was her job to turn on the lights so she went in and did so. The door then closed behind her and defendant stood in front of it. When she tried to leave, defendant grabbed her by her arm and her jacket with both hands, and slammed her down to the ground, causing her hit her head on the tile floor and momentarily black out. Defendant lifted her and slammed her down again, causing her to hit her head a second time. Defendant then got on top of her and choked her with both of his

hands. Defendant then held her down with one hand on her chest while tugging at her pants with the other hand. She resisted and told defendant about her four-year-old daughter. Defendant replied that he did not "give a fuck." Arnesha told defendant to let her go, that there were cameras on them, but he again said he did not "give a fuck." After Arnesha managed to get her phone out of her jacket pocket, defendant snatched it from her and slammed it face down on a nearby table. Though Arnesha carried a Taser in her pants pocket, she was unable to get to it.

Defendant was unable to unfasten Arnesha's pants, so while Arnesha was still on the floor, defendant leaned upward, poured white powder on the table, ingested it, and then released Arnesha. Defendant then asked whether she was going to "tattle" on him. She replied, "There is nothing going on. I'm not going to tell on you. There's nothing to tell." Defendant then turned out the light and they walked out together. Defendant continued to ask if she would tell on him. Making an effort to appear calm, she denied that she would report on defendant. When defendant got into the elevator, she remained behind, tried to call 911, but the screen was cracked and the phone did not work. She returned to the desk, found her personal phone and called 911 and her supervisor from the restroom where she remained until help arrived.

Surveillance video taken from cameras in the recreation room and elevator area showing Arnesha turning on the lights and defendant grabbing her, were shown to the jury. Although Arnesha's hair was mussed, she appeared to be calm. Arnesha testified that she was afraid, but tried to remain calm so that she could reach somewhere safe to call 911.

On cross-examination, Arnesha acknowledged that her pants did not come down as a result of defendant's tugging at them, that defendant did not try to stick his hands into her pants, he did not reach under her shirt or try to feel her breasts or vagina, and he did not tell her to take off her pants or any other clothes.

DISCUSSION

I. Substantial evidence

Defendant contends that his conviction of count 1 was not supported by substantial evidence. In particular, he claims that there was insufficient evidence to support a finding that his intent was to rape Arnesha, as opposed to some other intent.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23

Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The trial court instructed that "rape" is sexual intercourse accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. "A defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.)

Our review of the evidence, including all facts the jury could reasonably deduce therefrom, amply supports the verdict. The evidence gave rise to the reasonable inference that defendant attempted to isolate Arnesha from sources of help. First defendant sought to share Arnesha's lunch with her. Then, beginning just before 3:00 a.m., when all other residents were apparently asleep in their rooms, defendant approached Arnesha to complain about noise, presumably trying to get her to investigate. Twice she checked the floor above defendant's room, and heard no noise. Defendant then approached a third time, and asked Arnesha to come to his room to listen for the noise. The jury could reasonably infer from defendant's act of opening

his door while the television was showing pornography, that he intended it as an invitation to have sex.

After Arnesha refused to enter defendant's room, defendant persuaded her to go to the basement and into the dark, deserted recreation room. There he blocked her exit, and attacked her, providing compelling evidence that it had been his intent all evening to sexually assault Arnesha as soon as he isolated her either in a place where his loud radio would cover any calls for help or in a place so far from others that she would not be heard. Finally, he further demonstrated an intent to use force when he incapacitated Arnesha by slamming her head twice on the tile floor and then choking her. Defendant demonstrated his intent to forcibly have sexual intercourse with Arnesha, by holding her down in a prone position with one hand as he tugged at her pants in an effort to unfasten them, while she struggled to get free.

Defendant sets forth the facts of several cases in which the jury's inference of intent to rape was upheld based upon evidence which defendant believes to have been stronger than the evidence presented here. (See, e.g., *People v. Nye* (1951) 38 Cal.2d 34, 37 [attack in victim's bedroom; defendant admitted intent to have sex, not to rape], disapproved on other grounds in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882; *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1155, disapproved on other grounds in *People v. Rayford* (1994) 9 Cal.4th 1, 21 [victim forced into dumpster enclosure where defendant fondled her breasts and vaginal area and said "I will" in response to companion's remark that he would not mind getting "a piece of that"]; *People v. Craig* (1994) 25 Cal.App.4th 1593, 1599-1600 [defendant grabbed victim by the hair, forced her into her car, and placed his hand on her

breasts under her shirt; evidence showed similar conduct with two other women].)

Relying on these cited cases, defendant concludes that the evidence in this case fails to support his conviction. Defendant claims that his unsuccessful attempt to pull down Arnesha's pants means that he did not *try* to remove her clothes. He infers from the abandonment of the effort, combined with the fact that he did not grope her, pull out a condom, expose himself, or make a statement about wanting to engage in sexual intercourse, that he did not demonstrate an intent to have sexual intercourse with her. As none of the cited cases purported to establish a bright-line rule as to what specific acts must occur before a jury can reasonably infer an intent to rape, we decline to do so here. Moreover, as specific intent must necessarily be inferred from all the facts and circumstances which surround the crime, a review for sufficiency of the evidence must necessarily turn on the particular facts of each case. (*People v. Smith* (2005) 37 Cal.4th 733, 744-745.) "[T]herefore comparisons between cases are of little value. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138, citing *People v. Thomas* (1992) 2 Cal.4th 489, 516.)

Defendant also offers an example of a case in which the appellate court did not find sufficient evidence of intent to rape. (See *People v. Greene* (1973) 34 Cal.App.3d 622 (*Greene*).) In that case, during a brief encounter on the street, the defendant held the victim by the waist, moved his hands up and down her waist, claimed he had a gun, and said he just wanted to play with her before she ran away to safety. (*Id.* at pp. 650-653.) The court declined to infer an intent to commit sexual intercourse rather than some other lascivious act or simply an "attempted seduction," because the defendant said he merely wanted to play,

and because he did not exhibit his private parts, offer money for sex, or grab her crotch, as defendant had done when he accosted other women on the street in a similar fashion before they escaped. (*Id*. at pp. 628-630, 648, 651-653.)

In conducting a review for substantial evidence, it is error to "[focus] on evidence that did not exist rather than on the evidence that did exist. [Citation.]" (*People v. Story* (2009) 45 Cal.4th 1282, 1299.) We thus do not find *Greene* persuasive, and again decline to set forth a bright-line rule of what acts the evidence must show before the jury may reasonably infer an intent to rape.

Having focused on the evidence presented and having drawn all reasonable inferences in support of the jury's finding that defendant's intent was to commit rape, we conclude that substantial evidence supports defendant's conviction of count 1. As the circumstances reasonably support the jury's findings, defendant is not entitled to a reversal merely upon showing that the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Rodriguez*, *supra*, 20 Cal.4th at p. 11.)

II. Florida and Georgia robbery convictions

Defendant contends that the trial court erred in ruling that his 1990 Florida conviction and 1994 Georgia conviction for robbery qualified as serious felonies under California law, and thus the third-strike sentence and the five-year recidivist enhancements imposed under section 667, subdivision (a)(1), must be reversed. Respondent agrees that the trial court erred, but requests remand for retrial and resentencing.

A. Underlying legal principles

Under the Three Strikes law, a prior conviction of one or more statutorily defined serious or violent felonies is subject to increased punishment. (§§ 1170.12, subd. (a), 667, subd. (b).) In addition, a defendant is subject to a five-year sentence enhancement for each prior conviction of a statutorily defined serious or violent felony. (§ 667, subd. (a)(1).) For purposes of these provisions, a violent felony is defined in subdivision (c) of section 667.5, and a serious felony is defined in subdivision (c) of section 1192.7. (See § 1170.12, subd. (b)(1); § 667, subds. (a)(4), (d)(1).) As relevant here, robbery is both a serious and a violent felony. (§§ 1192.7, subd. (c)(19), 667.5, subd. (c)(9).) Any felony in which the defendant personally used a firearm is a serious felony. (§ 1192.7, subd. (c)(23).) "A prior conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison shall constitute a prior conviction of a particular serious and/or violent felony if the prior conviction in the other jurisdiction is for an offense that includes all of the elements of the particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§ 1170.12, subd. (b)(2).)

"[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred. [¶] On the other hand,

the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citations.]" (*People v. Miles* (2008) 43 Cal.4th 1074, 1082-1083.) It is the prosecution's burden to prove the elements of the sentence enhancement beyond a reasonable doubt, and "[o]n review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence." (*Id.* at p. 1083.)

In California, a robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The statute has been interpreted as requiring the specific intent to permanently deprive the victim of the property, although "permanently" is not an inflexible concept, and may include an intent to keep the property for an unreasonable period of time or use it in such a way as to deprive it of most of its value. (*People v. Avery* (2002) 27 Cal.4th 49, 54-56.)[4]

---

[4] A robbery conviction under a sister-state statute that does not require a specific intent to permanently deprive the victim of the property may qualify as a serious or violent felony for purposes of sentencing in California, if it includes an equivalent intent, as suggested in *Avery*, *supra*, 27 Cal.4th at pages 54-56. (See *People v. Mumm* (2002) 98 Cal.App.4th 812, 816-817 [finding equivalent in Arizona robbery statute].)

B. The Florida conviction

The records from Florida before the trial court consisted of an information, a negotiated plea form, a "Judgment," and a "Sentence." In relevant part, the information alleged that defendant "did carry a firearm, to-wit: a pistol, and did unlawfully by force, violence, assault, or putting in fear, take money or other property, to-wit: money, the property of Mary Parmer, as owner or custodian, from the person or custody of Mary Parmer, and during the course of committing or attempting to commit the aforementioned robbery . . . had in his possession a firearm or destructive device, to-wit: a pistol, contrary to the provisions of Section[] 812.13 . . . Florida Statutes." Defendant pled guilty to that count, and two other counts were dismissed. The Judgment states that defendant entered a plea of guilty to "armed robbery," a first degree felony.

In 1991, when defendant was convicted of the Florida robbery, Florida Statutes, section 812.13 defined robbery as "the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of by force, violence, assault, or putting in fear." (Laws of Florida (1987) ch. 87-315, § 1.) In 1990, the robbery statute had been judicially construed as requiring an intent to either *temporarily or permanently* deprive the owner of the property, and was amended in 1992 to reflect that construction. (See *Daniels v. State* (Fla.Ct.App. 1990) 570 So.2d 319, 320-322.) The *Daniels* court explained that in 1987 Florida had eliminated "larceny" in favor of "theft," defined as "the obtaining or using of the property of another with intent to *either* temporarily or permanently deprive the owner of the property." (*Id.* at p. 320; Fla. Stat., § 812.014.) Thus, as robbery

in Florida could have been committed in one of two ways, defendant's conviction cannot qualify as a serious or violent felony for California sentencing purposes unless the record of conviction shows that defendant committed the crime with the specific intent to permanently deprive the victim of her property, either literally, or under California's flexible definition.

In addition, the record of conviction before the trial court does not support a finding that defendant personally used a firearm in the commission of the felony. (See § 1192.7, subd. (c)(23).) "'[U]se' means to 'display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.' [Citations.]" (*In re Tameka C.* (2000) 22 Cal.4th 190, 197; see also *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319-1320; § 1203.06, subd. (b)(2).) The charging document alleges merely that defendant "did carry a firearm," and the Judgment described the crime as "armed robbery." In California, "armed" is not synonymous with "used." (*People v. Bland* (1995) 10 Cal.4th 991, 997-998.)

Thus, defendant's Florida robbery conviction cannot qualify as a serious felony for California sentencing purposes, unless the record of conviction contains defendant's admission or a stipulated factual basis, to the effect that he intended to permanently deprive the victim of her property or personally used a firearm in the commission of the robbery. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 136-138 (*Gallardo*).) As the reporter's transcript of the plea was not included in the record of conviction presented to the trial court in this case, we conclude that on this record, the trial court's finding that the Florida conviction was for a serious or violent felony is unsupported by substantial evidence.

C. The Georgia conviction

The records from Georgia consisted of an indictment, a guilty plea form, and an order of adjudication. It was alleged that in 1993, defendant committed robbery by "unlawfully, with intent to commit theft, tak[ing] property, to-wit: a purse and set of keys, from the person and immediate presence of Jill F. Sprague, by use of intimidation and threat and by placing such person in fear of immediate serious bodily injury to herself." The plea form and the order of adjudication both state that defendant pled guilty to robbery. There are no stipulated facts or other evidence in the record of conviction to indicate that defendant harbored the specific intent to permanently deprive the victim of her property.

At the time of defendant's Georgia conviction, robbery was defined as the taking of property of another from the person or the immediate presence of another, *with intent to commit theft*, either (1) by use of force, or (2) by intimidation, threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another. (O.C.G.A. § 16-8-40(a).)[5] In Georgia, "[t]he intent to withhold property of another even temporarily satisfies the mens rea requirement of the theft by taking statute." (*Ferrell v. State* (1984) 322 S.E.2d 751.) "'[A] person commits the offense of theft by taking when he unlawfully takes . . . any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.' O.C.G.A. § 16-8-2. '"Deprive" means, without justification: To withhold property of another

---

[5] The statute also provides a third manner: "By sudden snatching." However, the indictment did not charge robbery by snatching.

permanently or temporarily . . . .' . . . O.C.G.A. § 16-8-1(1)(A). Thus, regardless of whether [the defendant] intended to take the [property] and withhold it permanently, his intent to take it for his own temporary use without the owner's authorization evinces an intent to commit a theft." (*Smith v. State* (1984) 172 Ga.App. 356, 357.) It follows that robbery does not require a taking with the intent to permanently deprive the victim of his property. (*Phelps v. State* (1990) 194 Ga.App. 493, 495, citing *Smith v. State*.)

Thus, defendant's Georgia robbery conviction cannot qualify as a serious or violent felony for California sentencing purposes unless the record of conviction contains defendant's admission or a factual basis stipulation made during his guilty plea, to the effect that he intended to permanently deprive the victim of her property. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 136-138.) As the reporter's transcript of the plea was not included in the record of conviction presented to the trial court in this case, we conclude that on this record, the trial court's finding that the Georgia conviction was for a serious or violent felony is unsupported by substantial evidence.

D. Remand for resentencing

When a strike allegation is reversed on appeal for insufficient evidence, the allegation may be retried. (*People v. Barragan* (2004) 32 Cal.4th 236, 240-241.) This rule includes reversal due to insufficient evidence to support the trial court's finding that the prior conviction was for a serious or violent felony. (*Id*. at pp. 245-246; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 813-814.) Defendant argues that this rule is inapplicable here because the trial court's ruling was based upon an error of law, not the evidence presented. Defendant observes

that the only part missing from the record of conviction that the trial court could constitutionally review, is the reporter's transcript of the guilty pleas. (See *Gallardo*, *supra*, 4 Cal.5th at pp. 136-138.) He argues that it is unlikely that reporter's transcripts would be available after so many years, and that the prosecutor should have known that this additional evidence was necessary. Such arguments resemble the contentions based on due process and law of the case which were rejected in *Barragan*, at pages 243-250. There, the court held that in cases where retrial is appropriate, and the record on appeal does not establish that the prosecution will be unable to produce admissible evidence on retrial, the prosecution must be given the opportunity to do so, subject to defendant's evidentiary objections in the trial court. (*Id*. at pp. 249-250.) As retrial is appropriate here, we reject defendant's arguments.

III. *Romero* motion

Defendant contends that the trial court abused its discretion in denying his motion brought pursuant to section 1385 and *Romero*. Defendant acknowledges respondent's concession that the trial court erred in finding that the out-of-state convictions qualified as serious felonies. Respondent further claims that the *Romero* issue is moot, but asks that this court give the trial court guidance on what part of the records of conviction should be admissible on retrial. At the same time defendant recognizes that guidance on that subject was given by the California Supreme Court in *Gallardo*. We agree with respondent that this issue is moot and premature. Defendant will have an opportunity to object to any inadmissible evidence in the trial court if the prosecution elects to retry the prior convictions.

We also decline defendant's request that we instruct the trial court how to resentence him. As we remand for retrial and resentencing, "'full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' [Citations.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893; see *People v. Castaneda* (1999) 75 Cal.App.4th 611, 614-615 [full resentencing proper after unauthorized enhancement set aside].)

IV. Section 654

Defendant contends that the trial court, pursuant to section 654, should have stayed the sentence on count 2 (dissuading a witness by force or threat), rather than imposing a concurrent sentence.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) In general, section 654 precludes multiple punishments for a single physical act that violates different provisions of law, although "what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) In some cases, it may be appropriate to apply the "intent and objective" test. (*Id.* at pp. 359-360.) Under that test, "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

(*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), disapproved on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 334, 336.) "'The defendant's intent and objective are factual questions for the trial court . . . .' [Citation.]" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Defendant claims that the trial court made no express finding regarding the applicability of section 654, but points out that the court found that although the two counts did not merge, the two offenses were closely related and not truly independent of each other. "A trial court's express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence. [Citation.]" (*People v. Brents* (2012) 53 Cal.4th 599, 618.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

As discussed above, substantial evidence established that defendant's intent and objective was to rape Arnesha when he isolated her in the basement; that he incapacitated her by hitting her head twice on the tile floor and choking her; and that he held her in a prone position as he tugged at her pants in an effort to unfasten them. It is undisputed that sometime during the assault, when Arnesha managed to get her phone out of her jacket pocket, defendant grabbed it and slammed it face down on the table, causing it to break. A reasonable inference arises from defendant's act of grabbing and breaking the phone, that defendant harbored the separate objective of avoiding detection and arrest by dissuading the victim from calling for help or reporting the assault.

Defendant contends that the objective of preventing Arnesha from calling for help or reporting the assault was merely incidental to the objective of accomplishing the assault with intent to commit rape. Objectives are incidental when one is merely the means of accomplishing the other. (See *People v. Perez* (1979) 23 Cal.3d 545, 551-552.) For example, in *Neal*, the defendant, whose objective was to kill the victims by setting fire to their bedroom, could not be punished for both attempted murder and arson, as arson was the means of accomplishing the single objective of killing the victims. (*Neal, supra*, 55 Cal.2d at pp. 19-20.) Here, the means of achieving each of the two objectives was different. Breaking the phone was not a means of assaulting Arnesha with intent to rape, and assaulting Arnesha with intent to rape was not a means of preventing her from calling for help or reporting the assault. The two crimes were thus not incidental to one objective.

We also reject defendant's argument that multiple punishment is precluded simply because the assault was ongoing when the dissuasion offense was committed. Multiple punishment is permitted for offenses committed with separate objectives even if they are simultaneous or consecutive and similar. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212, citing e.g., *People v. Harrison* (1989) 48 Cal.3d 321, 334-338 [consecutive]; *People v. Coleman* (1989) 48 Cal.3d 112, 162 [simultaneous].) Here, the two objectives may have been simultaneous, or one may have been ongoing when the other was formed, but they were nevertheless separate. (Cf. *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657-1658 [shotgun pressed against the victim's stomach achieved objective of robbing him, while simultaneously reading aloud victim's address from his

driver's license and threating future harm achieved objective of avoiding detection and conviction].) We conclude that the trial court was not required to stay the sentence imposed as to count 2.

V. Fines, fees, and clerical errors

Defendant contends that the court erred in imposing a $10 crime prevention fee. Respondent agrees, as do we, as the fee is applicable only to certain theft-related offenses (1202.5, subd. (a)).

Defendant also contends that multiple costs, penalties and sentence terms were noted incorrectly on the amended abstract of judgment. Defendant notes that the "$899 court cost" stated in section 12 of the amended abstract, was not orally imposed by the court, and both parties surmised that it was instead intended to refer to mandatory penalty assessments imposed on the section 290.3 sex offender fine which should total $930. However, those items should be set out separately. (See *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1458-1459.) Defendant also asserts that the abstract erroneously reflects a sentence of both life with the possibility of parole and 25 years to life.

Defendant requests that the trial court be ordered to note in section 3 of the abstract that only one five-year enhancement was imposed as to each count, and that the two enhancements were ordered to run concurrently. Respondent agrees that the notations should be included in the event the trial court imposes the same sentence as it initially imposed, but points out that that it is premature to order such notations in the abstract.

We agree with respondent. As we reverse the sentence, the financial obligations imposed are also vacated. The trial court may determine and properly document the appropriate fees, fines, and assessments at the time of resentencing. Then, as

respondent notes, the court will have the opportunity to supervise the preparation of a second amended abstract of judgment in order to avoid the issues identified in this appeal.

VI. Ability to pay

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, (*Dueñas*), defendant asks in supplemental briefing that we vacate the $80 in court operations assessments imposed pursuant to section 1465.8, subdivision (a)(1), as well as a $60 court facilities assessment imposed pursuant to Government Code section 70373. Defendant also asks that we order the trial court to stay the $300 restitution fine that it imposed pursuant to section 1202.4, until such time as the People prove his ability to pay. Section 1465.8, section 1202.4, and Government Code section 70373, bar consideration of the defendant's ability to pay unless the fines and assessments are imposed in amounts above the stated minimum. *Dueñas* held that, based on the constitutional guarantees of due process and equal protection, ability to pay any amount must be read into those statutes; thus a defendant may object to the imposition of fines and assessments in any amount. (*Dueñas*, at pp. 1164-1169, 1172 & fn. 10.) However, *Dueñas* did not hold, as defendant suggests, that the People bear the *initial* burden of proof on a defendant's ability to pay. Indeed, as a defendant is the most knowledgeable person regarding his ability to pay a fine, it is incumbent upon him to at least raise the issue and make a prima facie showing. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154.)

Because the matter is remanded to the trial court for resentencing, respondent argues that defendant may at that time request a hearing on his ability to pay the fees, fines and assessments. Among other reasons, respondent argues that this

court should not decide the issue or direct the trial court to hold a hearing absent a request, because defendant has forfeited the issue. In a case filed subsequent to *Dueñas*, the same court declined to find forfeiture from the defendant's failure to object, as *Dueñas* was based on a newly announced constitutional principle that could not reasonably have been anticipated. (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489.) However, appellate courts have found forfeiture when the defendant fails to object to fines and assessments imposed in amounts or under statutes permitting a consideration of ability to pay. (See *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 457, 464; *People v. Frandsen*, *supra*, 33 Cal.App.5th at pp. 1153-1154.) As defendant was assessed the *minimum* fines and assessments called for under section 1465.8, section 1202.4, and Government Code section 70373, those statutes barred consideration of his ability to pay the minimum amounts. Thus, the issue would not be forfeited by the failure to object to the minimum amounts.

Defendant also asks that we stay the $300 sex offender fine pending the People's demonstration of his ability to pay. However, as a defendant may assert an inability to pay the sex offender fine (see § 290.3, subd. (a)), it was his obligation to do so at the time it was imposed. (See *People v. Acosta* (2018) 28 Cal.App.5th 701, 707-708.) Furthermore, it was not the prosecution's initial burden to demonstrate an ability to pay, but rather defendant's burden to make a prima facie showing of his inability to do so. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) Defendant requests that as an alternative to finding the issue forfeited, we consider whether trial counsel rendered ineffective assistance by failing to object to the fine.

We agree with respondent that it is unnecessary for this court to reach any issue concerning ability to pay or ineffective assistance of counsel, as the entire sentence, including all financial obligations imposed, is vacated. Defendant will have the opportunity on remand to assert, upon the proper showing, an inability to pay fines, fees, or assessments imposed by the trial court.

DISPOSITION

The judgment of conviction is affirmed. The sentence, including any fines, fees, and assessments imposed, is vacated, and the matter is remanded for hearing and resentencing.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST